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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1485

FRED DE MAIO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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1. The principal, indeed the sole, contention of the Solicitor General in opposition to the granting of certiorari in the instant case relative to our *Bruton* argument, is that the introduction of the testimony of the co-defendant's statement was "harmless beyond a reasonable doubt" within the meaning of *Harrington* v. *California*, 395 U.S. 250 and *Chapman* v. *California*, 386 U.S. 18. Importantly,

if not fatally, this argument is made for the first time into this Court. The Court of Appeals neither cited nor relied upon either *Chapman* or *Harrington*. Accordingly there is no judicial finding (we would urge such a finding could not be supported in the record) that the evidence against petitioner was "overwhelming." Although the Court of Appeals admittedly concluded, without discussing the evidence or the application of *Bruton* to the instant facts (for that matter without even citation of *Bruton*), that the evidence against petitioner was "unusually clear," the lower court did not and it is submitted in the posture of this case could not venture so far as to conclude as urged here that the error was "harmless beyond a reasonable doubt."

A simple comparison of the facts of *Harrington* with the facts of the instant case shows beyond preadventure of a doubt that the evidence in the instant case was hardly "overwhelming" or that the error was "harmless beyond a reasonable doubt."

(a) In *Harrington* the co-defendant-declarant took the witness stand and was fully cross-examined about the statement implicating petitioner. Braico, the co-defendant declarant in the instant case, did not testify and was of course not subject to cross-examination. (In *Bruton* this Court, quoting from *Douglas* v. *Alabama*, 380 U.S. 415, 420, observed that "effective confrontation of Loyd was possible only if Loyd affirmed the statement as his." *Bruton* v. *United States*, 391 U.S. 123, 127).

(b) In *Harrington* petitioner himself testified and admitted to the substantial truth of the statement there introduced in violation of *Bruton*. Contrast the circumstances of the instant case where petitioner DeMaio did not testify and by his plea of not guilty denied all of the allegations of the indictment.

(c) In *Harrington* there was corroboration of the testimony admitted in violation of *Bruton* inasmuch as many other independent witnesses placed *Harrington* at the scene of the crime. Here there was not nor could there be any corroboration of the unfounded hearsay assertion that Frank Diamond "put the word out" that he could get the remainder of the jewelry for $3,000. The very nature of the statement along with Fernandez' own admission that the word had been put out—"to who I don't know but some other people" (A. 21)—demonstrates it could not be corroborated and constituted the rankest sort of hearsay.

Finally, continued and invariable reliance by the government on the theory that the evidence is "overwhelming" and the error was "harmless beyond a reasonable doubt" smacks of the story of the little boy who always cried "wolf." In the instant case—where there are no confessions, no incriminating testimony of agents who observed events to which they testified, no independent witnesses as to the involvement of DeMaio, but simply the totally uncorroborated no less self-contradictory testimony of two thieves who had a motive to lie—can it fairly be urged that the evidence is "overwhelming"? If the contradictory and bias-motivated testimony of two thieves who admitted to numerous lies to agents, one of whom first told the agents that he sold *all* of the jewelry to co-defendant Braico, is overwhelming, it staggers the imagination to conceive of a case where the government would or could allow that the evidence of guilt was less than "overwhelming."*

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*The contradictions in the testimony of Fernandez and Garland are set forth in detail in the Reply to Brief in Opposition to the Granting of the Petition for Writ of Certiorari filed by petitioners Braico and Routa in the companion case, No. 1887 Misc., O.T., 1969.

Moreover, assuming *arguendo* but not conceding that the evidence of guilt was "overwhelming" on the substantive count, this case nevertheless presents the first opportunity known to petitioner for this Court to review the application of *Bruton* to the situation where there is failure of proof of a conspiracy charged upon which inadmissible evidence and prejudicial evidence is admitted. In view of the policy of this Court's use of the certiorari power not merely to review the correctness or incorrectness of the decisions of the Court of Appeals, but as a vehicle for speaking to the broader issues involved, this Court should grant certiorari to determine the application and effect of *Bruton* to conspiracy prosecutions, especially where as here and in *Schaffer* the conspiracy upon which the admissibility of the prejudical testimony is predicated is unproven.

2. The Solicitor General observes at p. 5 of its Brief that the contentions relating to improper denial of severance are answered in the government's brief in the companion case, No. 1887 Misc., O.T. 1969, pp. 4-5. Petitioner has not been provided with a copy of the government's brief in the companion case and can therefore offer no reply to those arguments.

Respectfully submitted,

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